In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 76-938

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Petitioners,

vs.

PACIFIC MARITIME ASSOCIATION, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, et al.,
Respondents.

BRIEF FOR INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION

NORMAN LEONARD,
1182 Market Street,
San Francisco, California 94102.
Attorney for Respondent International Longshoremen's and Warehousemen's Union.

GLADSTEIN, LEONARD, PATSEY & ANDERSEN,
1182 Market Street,
San Francisco, California 94102.
Of Counsel.

PERNAU-WALSH PRINTING CO. - 582 MISSION STREET - SAN FRANCISCO, CA 94105
81

Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 76-938

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Petitioners,

vs.

PACIFIC MARITIME ASSOCIATION, INTERNATIONAL
LONGSHOREMEN'S AND WAREHOUSEMEN'S
UNION, et al.,
Respondents.

BRIEF FOR INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION

I. QUESTIONS PRESENTED

1. Does the Federal Maritime Commission, under section 15 of the Shipping Act, 1916, 45 U.S.C. § 814, have jurisdiction over the terms and provisions of collective bargaining agreements?

2. Are any of the terms of employment, including the fringe benefit programs, which the ILWU bargained for on behalf of the longshoremen of the

Pacific Coast in 1972 subject to filing and approval or modification by the Federal Maritime Commission prior to and during their implementation?

II. COUNTERSTATEMENT OF THE CASE

While it is unnecessary to reiterate the means by which this case has reached the Court there are several crucial elements in that progression which have thus far been neglected. In overruling its Hearing Counsel below, the Commission found itself to be the proper forum for what are essentially labor and, at the periphery, antitrust matters. This it did by making substantive determinations hitherto thought to be within the jurisdiction of the National Labor Relations Board and the federal courts.

The Commission classified the subject matter of the agreements as non-mandatory items of collective bargaining without describing either the bargaining history or analyzing the case law in the area, found the ILWU likely to engage in specific collective activities without considering that the activities, if engaged in, would be labor practices either protected under the National Labor Relations Act or prohibited thereunder, and made a determination as to the proper scope of the bargaining unit regardless of the NLRB's statutory responsibility in this area.

In making its jurisdictional determination the Commission relied upon a test of its own devising, a test which it presents as a correct distillation of this Court's decisions in the labor/antitrust area. Yet the

Commission found it unnecessary to decide the issues of conspiracy in restraint of trade or predatory intent, held the terms of section 15 to evince a legislative intent to bring collective bargaining agreements under the Commission's pre-implementation scrutiny and analyzed this Court's decisions as authorizing the creation of a labor exemption from the Shipping Act "analogous" to that under the antitrust laws.

The ILWU thus finds itself subject to the *de facto* jurisdiction of the Commission and finds its agreements and activities subject to the Commission's approval although the ILWU is not a "person" subject to the Shipping Act.

III. SUMMARY OF ARGUMENT

In *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission,* 390 U.S. 261 (1968), the Court drew a distinction, for Shipping Act purposes, between collectively bargained agreements and arrangements among employers implementing collective bargaining agreements. The Court rejected both the position that all agreements implementing collective bargaining agreements were exempt from section 15, simply because they were linked to collective bargaining agreements, and the position that the Commission had jurisdiction over bona fide collective bargaining agreements. The Court was clear that agreements which were collectively bargained between labor and management were not subject to section 15 scrutiny. Nevertheless, the Commission has now clearly stepped across the line drawn in *Volkswagenwerk* and has asserted jurisdic-

tion over the substantive terms of a collectively bargained agreement which covers the systems of hiring, work allocation, fringe benefit programs and terms of employment in the longshoring industry of the Pacific Coast. The Commission, apparently, finds the provisions of the Shipping Act—which it administers—to be so like the antitrust laws—which it does not administer—that it can justifiably determine whether to grant a "labor exemption" to a collective bargaining agreement. It does so by means of a four-prong test which the Commission believes to be a distillation of the labor/antitrust exemption cases of this Court. Not only is the test ill-conceived, it was erroneously applied to the collective bargaining agreement involved in this case. While the Commission holds itself authorized to "balance" labor and shipping concerns, not a single one of the four elements of the test—each of which is considered a condition precedent to the so-called labor exemption to the Shipping Act—includes a Shipping Act concern. In its analysis of matters outside its expertise, the Commission ignored both the bargaining history and bargaining realities of the longshore industry. More fundamentally, despite the Commission's emphasis on labor-related matters, it remained resistant to the national labor policy which denies to any administrative agency the power to fix, approve or modify the substantive terms of collective bargaining agreements prior to their implementation.

The court of appeals below concluded that collective bargaining agreements were not within the intent of

the legislative history of the Shipping Act, that the substantive determination as to the classification of subjects of bargaining was not within the Commission's expertise, and that the reconciliation of the labor and antitrust laws was within the federal courts', not the Commission's, competence. That court held, contrary to the Commission, that the law, if careful attention were given to the history and practicalities of collective bargaining, was more consistently interpreted by exempting collective bargaining agreements as a class from the pre-implementation requirements of section 15. The ILWU seeks the affirmance of the court of appeals' decision which corrects the Commission's error.

IV. THE HISTORY AND MEANING OF THE COLLECTIVE BARGAINING AGREEMENT BETWEEN PMA AND THE ILWU

The ILWU has bargained with the Pacific Maritime Association, with the federal government's approval, for more than forty years over substantially the same terms of employment as those which the Commission now seeks to bring under its own aegis. The significance to the dockworkers of the terms of employer access to the labor pool cannot be overemphasized. Yet the Commission was totally insensitive to the effect its assertion of jurisdiction would have upon the men of the Pacific Coast longshore industry, the ILWU and collective bargaining in the maritime industry.

Although the Commission challenged the validity of the entire collective agreement (Appendix [hereinafter "App."], pp. 9-13, 21-25, 194-97), it focused on only one part of it, Supplemental Memorandum No. 4, which sets out the terms upon which a major portion of the longshore labor force is to be made available to employers on the West Coast (App. pp. 290-93). That portion, called the registered, or joint, work force, is the lynchpin of a series of industry-wide institutions which are also the subject of the Memorandum. The federal government not only played a major role in the creation of these institutions, it has repeatedly approved them as essential to industrial peace in the longshore industry.

The General Strike of 1934 was postponed by the intervention of President Franklin Delano Roosevelt. On May 22, the day before the maritime unions of the Pacific Coast were to bring the industry to a standstill, he appointed a three-man board to attempt a resolution of one of the most intractable problems facing both the employers and the employees in the longshore industry.[1] The livelihood of longshoremen, both in this country and abroad,[2] had suffered for decades in an industry in which employment was not only irregular and based upon the itinerate arrivals of vessels, but in which there had always been a persistent oversupply of labor.

---

[1]Larrowe, *Shape-Up and Hiring Hall*. University of California Press (Berkeley and Los Angeles, 1955) p. 96 *et seq.*

[2]Keller, *Decasualization of Longshore Work in San Francisco*. Works Progress Administration National Research Project (Philadelphia, 1939) pp. 1-15.

The National Longshoremen's Board soon became aware that essential to any effective solution of the chronic turmoil in the longshore industry was the creation of new, coast-wide, centralized institutions capable of reconciling the fluctuating demand for labor with the need for stable employment. The institutions which resulted from the encouragement of the federal government—a registered work force, the hiring halls, central pay and record offices, pension plan, vacation and holiday plan, pay guarantee plan, welfare and mechanization plans—were the most innovative of their day, and their success can be measured by the long period of comparative industrial peace they have fostered (App. p. 87). It is the most crucial of these institutions, the one upon which all others rest, that is being attacked by the petitioners in this case.

The ports at whose behest these proceedings were instituted and on whose behalf they are being prosecuted (hereinafter, "the Ports") are not members of the Pacific Maritime Assocation[3] and were originally beyond the pale of the first coastwide agreement struck between PMA and the ILWU under government supervision.[4] In its certification of 1938, the National Labor Relations Board concluded that the ILWU was the exclusive representative for purposes of collective bargaining of all workers employed by

---

[3]PMA is the successor to the Waterfront Employers' Associations which functioned on a coast or port basis in 1934. Herein, references to PMA are meant to include these predecessors.

[4]The International Longshoremen's and Warehousemen's Union is the successor to the International Longshoremen's Association.

the multi-employer bargaining unit which encompassed virtually every longshore employer on the Pacific Coast.[5] The ILWU has, since that time, consistently and vigorously represented all longshoremen who work for those employers, regardless of their union affiliation or union status, and made all such workers beneficiaries of the coastwide agreements negotiated since that time.[6] The NLRB, like the National Longshoremen's Board, adopted the view that the "loss of the strikes in 1916 and 1919 was due to the lack of proper coast coordination among longshoremen which permitted the companies to play one port against the other,"[7] and concluded that there was an essential need for a single coastwide agreement rather than company or separate port agreements.

The essence of the union position in 1934, in 1938, and continuously to the present day has been that solidarity among the longshoremen of the Pacific Coast is essential to the prevention of any resurgence of the exploitation by wage competition which had been implemented by the whipsawing of the union between the employers and ports of the Pacific Coast.

In 1946 the federal government, this time in the form of the War Labor Board, once again encouraged

[5] *In the Matter of the Shipowners' Association of the Pacific Coast*, 7 N.L.R.B. 1002 (1938).

[6] "The union urges that it has built an industrial democracy with one type of citizen on the foundation of equitable work assignments." [*Waterfront Employers Ass'n*, 26 War Labor Reports at 538 (1945).] *See* Keller, pp. 41, 43, 51-78.

[7] *In the Matter of the Shipowners' Ass'n of the Pacific Coast*, 7 N.L.R.B. 1002 at 1008 (1938).

the centralized institutions by resisting an attempt by the employers to substitute steady gangs for the centralized rotational hiring practices won by the union. The federal government did not favor the alleged virtues of efficiency which the employers urged in support of steady gangs; rather, it recognized that the "countervailing vices of favoritism and inequality of work opportunity" which steady gangs engendered were in direct opposition to the fundamental objective of the union: equalization of job opportunity.[8]

Longshoring has been and continues to be a trade typified by irregular employment and the victim, like other labor-intensive semi-skilled trades, of an oversupply of labor.[9] The backbone of the 1934 National Longshoremen's Board award was the creation of a system of control of access to the labor force by means of joint union-employer registration of men at each port and port dispatch/hiring halls, all now under the ultimate control of a joint coast Labor Relations Committee.

If the force is too large it encourages wage competition among the men, if it is too small the employers must either reduce their economic activity or seek men outside the bargaining unit.[10] The size of the registered work force is thus critical, the result of a delicate balance struck by the union and the employers' association based upon an analysis of

[8] *Waterfront Employers Association*, 26 War Labor Reports 514 at 538 (1945).

[9] *See* Keller, pp. 36-43; Larrowe, pp. 151-63.

[10] Keller, pp. xvii-xix, 51 *et seq.*; Larrowe, pp. 150-3.

the job opportunities the association is likely to offer and the available work force.

"The establishment of the roster of registered longshoremen was the first duty of the joint Labor Relations Committee set up by the award in 1934"[11] and it remains the trust of the ILWU in 1977. Because it has stabilized the work force by means of the registration lists and hiring halls, the union has been able to establish safety and grievance procedures, experiment with medical, pension, vacation, guaranteed minimum income, and mechanization plans for casual workers, building, in the process, the present package of contract benefits.

A member of the registered work force obliges himself to be available, upon precise terms negotiated by the ILWU with PMA member employers and those non-members who participate in the joint programs. In return, he is offered preference of employment with those employers and the comprehensive contract benefits. This "decasualization," which means no more than the encouragement of stability in the industry, has been at the heart of collective bargaining on the Pacific Coast for over forty years. It is essential to the creation of a career which guarantees a dignity to the working man that the earlier competitive labor market had always denied him. In short, the men of the registered work force have become the employees of PMA members.

The Commission below refused to credit these facts because the registered men also work for other em-

[11]Keller, p. 25.

ployers, like the Ports (Appendix to the Petition for Certiorari [hereinafter "A.P."] at p. 62a). To suggest, as the Commission does, that employees who are not fully employed by any one employer, as is typical in the longshore trade, are thus denied their status as employees of PMA members is to completely misinterpret the basis of collective bargaining on the Pacific Coast.[12] The whole purpose in creating the registered force was and is to maintain an individual's status as an employee of PMA members regardless of the availability of work at any given place or time. Indeed, the package of fringe benefits, particularly the pay guarantee, paid vacation, pension and mechanization plans, were developed to provide for these employees when they were *not* employed by PMA members. The *quid-pro-quo* for this protection is that PMA members and non-member employer participants have first-call on the members of the registered force. It is precisely this arrangement which brought the turmoil of the 1920's and 1930's to an end by giving to longshoremen, for the first time in history, the possibility of the industrial security typically available, to men in other, more stable, industries.[13]

[12]Although the availability of men outside the registered force was made clear to the Commission (App. pp. 91-92), the Commission's Order does not contain any analysis of the labor pool and fails to distinguish between the registered force and the longshore labor force as a whole. That the men of the registered force have "jobs" with PMA member employers is indicated in the very first paragraph of Supplemental Memorandum No. 4 (App. p. 290). "The term 'employee' shall include any employee, *and shall not be limited to the employees of a particular employer.*" Section 2(3) NLRA, 29 U.S.C. § 152 (1947) (emphasis added).

[13]*See* Keller, *passim*, and Larrowe, pp. 83-115.

V. THE FEDERAL MARITIME COMMISSION DECISION

A. The Commission's Conceptual Errors

The Federal Maritime Commission, not grasping the implications of this bargaining history, inevitably misunderstood Supplemental Memorandum No. 4. The Commission sliced off the "master" agreement, that is, the body of the collective bargaining agreement, by ignoring its detailed mechanisms for the allocation of men[14] and "the system of industrial jurisprudence which has evolved for the administration of the agreement."[15] The Commission then declared Supplemental Memorandum No. 4 to be a non-mandatory item of bargaining (A.P. pp. 61a-62a, 69a. This insupportable conclusion resulted from a lack of understanding that the registered work force exists solely under the aegis of the ILWU-PMA collective bargaining agreement (A.P. pp. 67a, 69a, 70a; App. pp. 225-315).

Petitioners concede that casual labor exists on the Pacific Coast and is sufficient to fill the manpower needs of the Ports (App. pp. 186-87, 219-21; A.P. pp. 70a, 71a), but suggest that the registered work force is better skilled and is in the nature of an essential industry resource which the Ports must use to continue in operation (App. pp. 51-61). The Solicitor General equates the men of the registered work force with the "single bridge over the river" discussed in *United States v. Terminal Railroad*

[14]App. p. 203. The investigation of the "Master" Agreement, though ordered, has yet to take place. *See* App. pp. 12, 13, 22-25, FMC Order and Supplemental Order of Investigation.

[15]Larrowe, p. 85.

Association of St. Louis, 224 U.S. 383 (1912).[16] Two fallacies underlie this conception. First, and most importantly, "the labor of a human being," unlike a bridge, "is not a commodity or article of commerce."[17] Freedom of access to a bridge or inanimate resource by all the competitors in an industry leads only to additional wear and tear and perhaps a lower return on investment; freedom of access to the labor of an individual, as was true in the longshore industry prior to the 1934 agreement, leads to the loss of his integrity and, ultimately, to the loss of his dignity as a human being. Second, the registered work force is *not* a pool of skilled labor compelled by the union or circumstance to act as an indivisble unit. The men of the registered work force are *career* employees as opposed to casual employees, not *skilled* employees as opposed to unskilled employees.[18] The men of the registered work force have, since the beginning, been simply those men who depend primarily upon the longshore trade for the basis of their livelihood. It is they who are thus eligible for, and capable of being the beneficiaries of, the panoply of centrally-administered contract rights which are a very substantial portion of a dockworker's earnings.[19] Each member of the registered work force retains the freedom, which has been exercised from the beginning of the registered force, to select his status within

[16]Petitioners' Brief p. 43, n.31.

[17]Clayton Antitrust Act, section 6, 15 U.S.C. § 12 (1914).

[18]Keller, pp. 24-34.

[19]*See* App. p. 89.

the bargaining unit and the nature of his employment.[20] It would hardly need reiteration, but for the petitioners' misconception of men as an inanimate resource, that closed shops have been forbidden, at least since the advent of the Taft-Hartley Act.[21] Registration now means the benefit programs which are an essential component of a longshoreman's earnings. There would have been, and there can be, no such benefits if control of employer access to the labor force had not been jointly shared by the ILWU and the PMA.

While it now seems unlikely that any group of employers would go to the expense of creating a new fringe benefit program comparable to that administered by the Pacific Maritime Association, petitioners' brief neglects to mention that there is nothing in the agreements between the ILWU and PMA to prevent that development (App. pp. 91, 123, 208). As counsel for the ILWU we would not be surprised if the ILWU rejected any new program that involved an abandonment of control over the size of the labor force thus risking a resurgence of wage competition among the men to be so benefited. If the Ports wished to compete with the members of the Pacific Maritime Association for the men of the registered force they could offer to establish a comparable benefit program

[20]Keller, pp. 28-29.

[21]". . . Respondents do not seriously dispute that the provisions for preference of employment by reason of union membership are clearly proscribed by the Act." *In the Matter of International Longshoremen's and Warehousemen's Union*, 90 N.L.R.B. 1021 at 1026 (1950).

with sufficient added inducements to encourage the registered men to work on a new basis. There is no suggestion that the Ports have made or have any intention of making such an offer. They have repeatedly negotiated with the ILWU for access to longshore labor upon the condition that they, too, have access to the Pacific Maritime Association's fringe benefit program (App. pp. 91, 187-88).

For the Ports to complain that this arrangement somehow restricts their freedom of contract is disingenuous at best; for the FMC to hold that the ILWU is likely to engage in acts unlawful under the NLRA in an attempt to enforce an agreement which, the petitioners and the Ports claim, is directed toward ending any possible competition over fringe benefit programs among employers is unconscionable. On the contrary, the ILWU sees its agreement with PMA as forcing the Ports to make a clear decision on the creation of an independent program or the acceptance of the best package now available on the West Coast. The policy of the ILWU is to increase the number of men eligible for the highest benefits, thus reducing wage competition and improving living standards (App. pp. 101-03, 122-23). It can do so either through encouraging competition among the employers or by encouraging the adoption of the presently and realistically available industry-wide programs. This is the antithesis of the closed union or "unique resource" which is suggested in the allegations of the petitioners. While it is understandable that the Ports resist such developments out of

self-interest,"[22] it is not appropriate that they should cast the industrial background in a false light, choosing the forum, of those available, with the greatest likelihood of adopting such a foreshortened perspective.

B. The Handling of the Agreement by the Commission

That the FMC was a forum susceptible to misinterpretions of collective agreements is evident from its analysis of the Supplemental Memorandum. For example, Section 2 was found by the Commission to be a substantial imposition of terms upon the Ports (A.P. pp. 63a, 69a). That section requires that the terms of other contracts not be inconsistent with those sections of the "master agreement" (the "PCLCA") and of Supplemental Memorandum No. 4, which establish the basic mechanism of the joint work force —the registration lists. Given the history described above, it should be apparent that nothing is as crucial to the ILWU and the men it represents as joint control over the terms of admission to the registration list and the right of preferred employment it represents.[23] Without it, the entire structure of collective bargaining in the longshore industry collapses. It is no exaggeration to say that if the ILWU cannot effectively bargain for the terms of entry to that

[22]"The roots of the trouble strike deep: for the dispute is an important example of a larger conflict, the natural opposition of management to the necessarily levelling effects of trade unionism." *Waterfront Employers Association*, 26 War Labor Reports 538 (1945).

[23]*Supra*, Section IV.

list, the *raison d'etre* of the union vanishes (*see* Keller, pp. 16-50).

Significantly, this section of the Memorandum asks only for conformity with the basic practices pertaining to the registered work force. Hence, particular manpower problems in particular areas are clearly left open for negotiation as long as the basic system of introducing new members and disciplining present members on the list remains intact. The ILWU cannot contemplate giving up the primary tool by which it participates in the control of the size of the work force, and it is apparent that the ILWU has merely preserved its right to negotiate adjustments to that mechanism where circumstances require (*see, e.g.*, App. p. 271). If this mechanism is being imposed on the ports, then it is imposed by its creators, the National Longshoremen's Board and over forty years of labor relations history.

Section 3 is an agreement that the employees of PMA, the registered work force, will be supplied to other employers only upon the same, and no better, terms than to PMA members. This is the price the ILWU paid for the terms of employment in the 1972 agreement which cover the vast majority of Pacific longshoremen. Section 5 secures the integrity of the dispatch hall system through which the union jointly controls work allocation and the use of steady gangs. Steady gangs were, and are potentially today, one of the greatest sources of industrial strife and wage competition (*see* p. 9, *supra*). In the past employers would use a steady gang, assuring the

gang employment but preventing other men from working except upon exploitative terms. The straw boss would have to be bribed at the morning shape-up with part of the newcomer's pay if a new man was to work that day. The result, given the over-supply of men willing to work, was to set laboring man against laboring man in trying to curry the straw boss' and the employer's favor.[24] To end this wage competition, which forced men's wages to the minimum, and the favoritism which robbed them of what dignity remained at a minimal standard of living, the National Longshoremen's Board sanctioned the creation of jointly-administered dispatch halls which assured the rotation of gangs from employer to employer, breaking the link between a particular employer and "his" steady gangs.[25]

At present the contract does allow PMA members, as well as the Ports, the use of steady men, but only on specific terms,[26] the dispatch hall assuring equal sharing of the available jobs and gang rotation, where necessary, in order to prevent the abuses of the past. The speculations of petitioners and of the Ports (Petitioners' Brief pp. 7-14) that the ILWU will demand changes in these practices as a consequence of its accepting the Supplemental Memorandum are not supported by its terms. Nor is there any evidence in the record that the ILWU has de-

[24] *See* Larrowe, pp. 2-4, 25-26, 49-82, 185.

[25] *See* Larrowe, pp. 102-03. The dispatcher is elected by the members of the union, but he is employed by, and under the direction and control of, the joint labor relations committee.

[26] *See* App. p. 303 *et seq.*

manded or will demand changes as a consequence of this Memorandum.

Sections 4, 7 and 8 of the Supplemental Memorandum essentially fulfill the ILWU's demand that every member of the registered force receive *all* the benefits of the programs negotiated with PMA no matter whom the individual works for. The registered men can thus earn their credits under the PMA pension, welfare and vacation plans even though PMA employers do not have sufficient work for each man. In addition, they broaden the coverage of the Central Pay and Record Offices.

Allowing men to earn their credits no matter where they work on the Coast helps to fulfill one of the primary goals of the ILWU: the elimination of differentials whether in the form of wages or benefits (*see* discussion, pp. 14-16, *supra*). The central pay and record offices make it possible for the men to receive a single paycheck and permit national Social Security withholding. For years men were paid each Friday in coin at each place they had worked along the waterfront. Not only was this enormously inconvenient, it required a man to keep track of how long he had worked for each employer each day of the week[27] and was a boon for waterfront hangers-on and saloonkeepers. At present, the central pay and record offices eliminate these potential abuses and allow for the administration of one of the most extensive benefit programs for casual labor available in the United States.

[27] Larrowe, p. 93.

Section 9 makes the terms upon which nonmembers participate in the industry-wide institutions identical with those of PMA members. This is not only an assurance that the terms for nonmembers will not be more burdensome than for members but also that nonmember participants may not fall below the standard set by the terms of access by attempting to "stand still" while benefits are rising to meet the needs of the registered force.

Sections 10 and 12 of Supplemental Memorandum No. 4 were found by the Commission to be an interference with the freedom of the Ports' labor policy. There is no basis for the Commission's conclusion. The men of the registered force are not and should not be regarded as an indivisible work force which could be used to bludgeon the Ports into PMA. The provisions are only binding on those who choose to employ registered dockworkers and participate in industry institutions, and the ports are free to refuse to do so. More importantly, what is ignored by the Commission is the consistent long-term policy of the ILWU to equalize wages, benefits and work opportunities. Should a dispute arise with PMA during the contract term over the registered force, the entire force will be made idle on the same basis. Each man has been and will be treated as his fellow member in any dispute over the registered force.[28] Each employer of the registered force will prosper or suffer identically with every other.[29] Given the geographic

[28] *See* n.6, *supra*.

[29] *See* App. p. 34.

dispersal of the complaining Ports and PMA, any "whipsaw" would be of only marginal utility to the ILWU. It is more important to the union that the solidarity of its members, generated by equal treatment, be maintained in times of industrial strife."[30]

VI. THE DECISION OF THE COURT OF APPEALS

The court of appeals recognized that the reconciliation of the competing policies and statutory schemes relating to shipping, antitrust and labor concerns was a difficult one. Because it found that "the prior-restraint procedures of section 15 impose such an extraordinary burden on collective bargaining" (A.P. p. 2a), it concluded, following this Court's lead in *Volkswagenwerk*, that the dividing line, so far as concerns the Commission's jurisdiction, must be drawn between "labor-related agreements among employers . . . and direct agreements negotiated between union and management . . ." *(ibid.)*. The former were held to be subject to the Commission's jurisdiction. The latter were not.

The ILWU submits that this is a rational and sensible approach to the problem and that the judgment of the court of appeals should be affirmed.

[30] *See* text at n.7, *supra*.

VII. ARGUMENT

A. Svenska Does Not Support FMC Jurisdiction Over Collective Bargaining Agreements

The labor exemption to the antitrust laws is the product of a long and intricate interaction between this Court and Congress over the last many years. It is not merely an adjustment of jurisdiction over various enactments, it is the result of the clash between two major national policies as embodied in legislative landmarks.[21] It is not the result of a silent legislative history or one that is "unilluminating" (Petitioners' Brief, p. 24, n.25) or stated in "broad language" (Petitioners' Brief, pp. 19, 23), but is the result of repeated attempts by court and legislature to deal with one of the most intractable of modern jurisprudential inquiries.[22] At no point in this development has Congress or this Court ever encouraged the Federal Maritime Commission to play a role or involve itself in the law of labor relations.

The Government relies upon this Court's decision in *Federal Maritime Commission v. Aktienbolaget Svenska Amerika Linien,* 390 U.S. 238 (1968), as a springboard to a claim of authority to enforce anti-

[21]Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1890); Clayton Antitrust Act, 15 U.S.C. §§ 12-27 (1914); Norris-La Guardia Act, 29 U.S.C. §§ 101-15 (1932); Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.* (1947).

[22]*Apex Hosiery Co. v. Leader,* 310 U.S. 469 (1940); *United States v. Hutcheson,* 312 U.S. 219 (1941); *Allen Bradley Co. v. Electrical Workers Local 3,* 325 U.S. 797 (1945); *Hunt v. Crumboch,* 325 U.S. 821 (1945); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965); *Local 189, Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676 (1965); *Connell Construction Co. v. Plumbers & Steamfitters Local 100,* 421 U.S. 616 (1975).

trust principles and to supervise maritime labor relations even though the latter are tied to the antitrust laws *only* because they are generally exempt from their application.[23]

In *Svenska,* this Court merely upheld a Commission rule which allocated the burden of proof in approval hearings under the Shipping Act where a *per se* antitrust violation had been committed *by parties subject to the Shipping Act.* The Court, relying upon the recently added words of section 15, "contrary to the public interest," agreed with the Commission that sensitivity to the antitrust laws is appropriate when considering the exemption of an agreement *clearly within FMC subject-matter jurisdiction.* Even so, the Court made it clear that the Commission must cast its decision in terms of section 15 criteria.

The Court did not, however, give the Commission blanket authority to apply the antitrust laws in "the public interest," (Petitioners' Brief p. 33) nor to utilize its tangential concern with antitrust principles to reach beyond its own realm. It certainly did not authorize the Commission to embark upon the sea of labor relations simply because such matters, like some shipping matters, are also exempt from the antitrust laws. Yet the Commission has in the instant case determined not whether Supplemental Agreement No. 4 is exempt under the Shipping Act exemption to the *antitrust laws,* as in *Svenska,* but whether this collective bargaining agreement is exempt under the

[23]Petitioners' Brief pp. 33, 34, 41, 44, n.31.

labor law exemption, although there is nothing in its enabling Act to suggest that it has jurisdiction over collective bargaining agreements.

B. Volkswagenwerk Removed Collective Bargaining Agreements from FMC Jurisdiction

1. This Court has already decided that section 15 does not extend to collective bargaining agreements. *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261 (1968). In that case an agreement among the members of PMA to allocate the costs of a mechanization fund created by a collective bargaining contract was held to be subject to the Shipping Act where clear price discrimination effects against particular goods had been made manifest. The Court, however, was explicit in holding that it was not considering the collective bargaining agreement, but rather only the agreement among employers as to the method of sharing the costs attendant on the mechanization fund.[54] The agreement now before the Court is not one among employers allocating costs; on the contrary, it is one between the certified representative of employees and an appropriate multi-employer bargaining unit over the terms and conditions of employment.

The bargaining positions of the ILWU and PMA were directly opposed at the initiation of bargaining (App. pp. 88-103, 122-24). The compromise as to the terms of access to the registered work force, which resulted in Supplemental Memorandum No. 4, was

[54] *Volkswagenwerk v. FMC*, 390 U.S. at 278.

bargained in good faith at arm's length and, given its importance in the context of collective bargaining on the Pacific Coast, concerned a mandatory item of bargaining.[55] The union sought to insure that the men of the registered work force would receive the maximum package of benefits regardless of for whom they worked and the employers sought to restrict those benefits to men who worked exclusively for them.[56] If the union's initial position had prevailed, the men of the registered force would have equal benefits regardless of the distribution of job opportunities along the entire Pacific Coast, precisely in keeping with the long-term ILWU policy of equalizing job opportunities and eliminating wage competition. It is noteworthy that the Commission failed to realize that if the ILWU had not rigorously followed this policy, it would not have insisted that nonmembers have any access at all to the benefit programs. The Ports apparently feel that they have some sort of prescriptive right to the PMA/ILWU institutions (*see* App. pp. 51-61, 69-71, 84-86, 88-94, 101-03). Yet there was no obligation upon the ILWU to resist PMA's bargaining position which would have forbidden the Ports' participation in the benefit plans

[55] Each bargain struck since 1934 between the union and employer includes the terms of access to the registered force and has acknowledged PMA's right to first-call on that work force (a right shared equally by nonmember participants) and the employees' reciprocal right to the contract benefits. Since the late 1950's each agreement has included the terms of nonmember participation in the benefit institutions (*see* App. pp. 101-03, 122-23).

[56] The opening negotiating positions of the union and the employers are reproduced at App. pp. 106-12.

entirely. The union proceeded as it did, not out of altruism for the Ports, but in pursuit of its historic goal of equal wages and benefits throughout the Pacific Coast."

It was the ILWU that ensured that the benefit programs would remain open to nonmembers like the Ports; for the fact of the matter is that only a bargain with PMA can generate the coast-wide agreement which makes that policy a reality.

The NLRB has long recognized that fringe benefit programs are mandatory items of bargaining,[25] and this Court has settled that mandatory items remain mandatory even if they have consequences upon third parties. "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees," "not whether the third-party concern is antagonistic to or compatible with the interests of bargaining-unit employees." *National Woodwork Manufacturers Association v. NLRB,* 386 U.S. 612 at 645 (1967); *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.,* 404 U.S. 157 at 179 (1971).

The intent of Supplemental Memorandum No. 4, like the intent of the agreement in *Teamsters Local 24 v. Oliver,* 358 U.S. 283 (1959), which set the minimum rental that carriers would pay to truck

[25] *See Waterfront Employers Association,* 26 War Labor Reports at 538 (1945); Keller, pp. 1-2, 36-43, 51 *et passim.*

[26] It is firmly established that pension and welfare benefits, which are what Supplemental Memorandum No. 4 is about, are mandatory items of bargaining. *Hinson v. NLRB,* 428 F.2d 133 (8th Cir. 1970); *Inland Steel Co. v. NLRB,* 170 F.2d 247 (7th Cir. 1948), *cert. denied,* 336 U.S. 960 (1949).

owners who were not in their employ, and like the agreement in *National Woodwork,* which prevented the employer from using certain products, was to preserve the terms and working conditions of employees. The skewed view of the Commission, which saw third party effects as precluding a finding that the subject matter was a mandatory item of bargaining, was precisely converse to that of the Court in *Oliver* and *National Woodwork.*

2. The line in *Volkswagenwerk* was not lightly drawn by this Court. The Court was concerned that its limited ruling not be read as sweeping collective bargaining agreements under the jurisdiction of the FMC. The dispute between the dissent and the Court was not over whether *collective bargaining agreements* were within section 15 but whether *implementing agreements* were so firmly linked to collective bargaining agreements as to be likewise outside of section 15. The dispute between the concurrence and the Court was that Justice Harlan believed that collective bargaining agreements might be within section 15. He agreed with Justice Douglas, dissenting, that implementing agreements and collective bargaining agreements were indissoluably linked, but he *alone* saw no reason to find the FMC incapable of weighing collective bargaining agreements as a whole.

The Commission and the Solicitor General here embrace the view of Justice Harlan, ignoring the clear holding of the remainder of the Court which set collective bargaining agreements outside the Commission's jurisdiction. Implicit in the majority's

strong disavowal of the suggestion that it was ruling on the collective bargaining agreement was its anxiety, confirmed in this case, that the decision might be misinterpreted as sweeping collective bargaining agreements into section 15.

3. The Commission's practice of forcing changes in the substantive terms of agreements by making its approval contingent upon acquiesence in its judgment as to the meaning and impact of those terms[39] cannot be reconciled with the freedom of collective bargaining which is the quintessence of the national labor policy. *H. K. Porter Co. v. NLRB,* 397 U.S. 99 (1970). Petitioners seek to extend the power of the FMC beyond the clear boundaries of the national labor policy in complete disregard of the legislative and judicial protections created to foster that policy. The power petitioners assert for the Federal Maritime Commission is the power to approve and to modify the substantive terms of collective bargaining agreements which have competitive effects on third parties.[40] This assertion is made despite the fact that

[39]See for example: *Agreement No. 57-96 Pacific Westbound Conference Extension of Authority for Intermodal Services,* F.M.C. Docket No. 72-46 (1975), Pike & Fischer, 16 S.R.R. 159 at 165, 177, 178.

[40]Section 15 provides *inter alia:*

> *The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair* as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. [Emphasis added.]

the "goals of federal labor law never could be achieved if [such effects] on business competition were held a violation of the antitrust laws." *Connell Construction Co. v. Plumbers and Steamfitters Local 100,* 421 U.S. 616 at 622 (1975).

The "unilluminating"[41] legislative history of section 15 has already been analyzed by this Court. In *Federal Maritime Commission v. Seatrain Lines, Inc.,* 411 U.S. 726 (1973), a unanimous Court rejected such expansive readings of section 15's terms as now argued by petitioners *(see* Petitioners' Brief, pp. 22-27). Justice Marshall demonstrated that the legislative history confirmed that the word "agreements" was used as a term of art describing "practices or regular activities in which two or more shipping companies have agreed to participate over a considerable period of time," and for that reason "the statute thus envisions a continuing supervisory role for the Commission" (411 U.S. at 740 and 735). Such a role is simply incompatible with "the fundamental principle that the National Labor Relations Act is grounded on the premise of freedom of contract."[42] The Court

[41]Petitioners' Brief, p. 24, n.25.

[42]*H.K. Porter Co. v. NLRB,* 397 U.S. 99 at 107 (1970).
Section 15 provides *inter alia:*

> *The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.* [Emphasis added.]

One can only speculate as to the effect FMC jurisdiction may have, when exercised under its "policing" power, over arguably protected collective activities. The Commission itself suggested the potential for conflicts between itself and the NLRB below, "because there are involved in the National Labor Relations Act

observed that when Congress intended to bring a class of agreements under the control of a regulatory agency, it did so in unambiguous language."

The Commission his impermissibly extended *Volkswagenwerk,* which involved labor-raised agreements, by seizing upon dicta and the single opinion of Justice Harlan to justify a broadened reading of section 15." The Court's own insistence that its holding went only to agreements among employers implementing collective bargaining agreements is lost on the Commission.

The Court could not possibly have meant that collective bargaining agreements were subject to section 15 pre-implementation scrutiny, for it clearly stated that nothing in the opinion was to be understood as questioning the continuing validity of the collective bargaining agreement at issue in *Volkswagenwerk.*" Section 15 provides that no agreement subject to that section can be valid unless filed and approved and there was no question but that the *collective bargaining agreement* in *Volkswagenwerk* had not been so filed.

---

and the Shipping Act, 1916, two different purposes, it would not necessarily follow that a holding under NLRB concepts would be equally applicable to our responsibilities under the [Shipping] Act." (A.P. pp. 56a-57a, n.9). *See San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959); *NLRB v. American Nat. Ins. Co.,* 343 U.S. 395 (1952).

"It should be noted that the Commission has conceded that unions are not persons subject to the Shipping Act and that the basis upon which the Commission seeks to retain jurisdiction over the collective bargaining agreement is that it has jurisdiction over "mixed" groups (*see infra,* Section D and A.P. pp. 53a, 54a, 73a, n.19).

"Petitioners' Brief pp. 25, 26, 29, 30, 33, 34.

"*Volkswagenwerk v. FMC,* 390 U.S. at 278.

C. The Labor/Antitrust Cases Do Not Support FMC Jurisdiction over Collective Bargaining Agreements

Having erroneously found that Supplemental Memorandum No. 4 concerns non-mandatory items of bargaining, analogous to the assessment agreement at issue in *Volkswagenwerk,* although that case expressly did not concern a collective bargaining agreement, the Commission concluded that the terms of Supplemental Memorandum No. 4 are "strikingly similar" to the agreements analyzed in *United Mine Workers v. Pennington,* 381 U.S. 657 (1965), and that the "primary purpose" of the Supplemental Memorandum was to force the Ports, *not out* of business, but *into* the Pacific Maritime Association. Even though Supplemental Memorandum No. 4 does not require nonmembers to join PMA" the Commission found a curious analogy between the ILWU and the Mineworkers conduct by equating a "primary purpose" of forcing nonmembers into PMA with the "predatory purpose" of driving small operators out of business. Apparently, regarding this intent as essentially the same as the predatory intent requirement of *Pennington,*" the Commission went on to consider the effect not of the Ports' entry into PMA but of their refusal to sign Supplemental Memorandum No. 4. There is no conclusion or finding concerning the effect of Supplemental Memorandum No. 4 had the Ports succumbed to the alleged "imposition," nor is there a finding that

---

"A.P. p. 62a.

"[T]he actual holding of *Pennington* requires proof of the predatory purpose of the agreement between a union and the employers." *Associated Milk Dealers Inc. v. Milk Drivers Local 753,* 422 F.2d 546, 553 (7th Cir. 1970).

the Ports were economically weak[48] or that they would suffer disproportionately the burdens of the PMA programs, as was the case in *Pennington*.

Similarly, the Commission relies on *Local 189, Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965), as justification for its jurisdiction over some collective bargaining agreements.[49] The Court's determination in *Jewel Tea* that the exclusive jurisdiction of the NLRB over collective bargaining did not deprive the *federal courts* of jurisdiction over the agreements resulting therefrom is seized upon by the Commission as justification for its asserted concurrent jurisdiction with the federal courts (A.P. p. 49a-51a). This leap would be justifiable at best only if the Commission had the comprehensive experience in administering labor policies that the federal courts have.[50]

Respondent here will not attempt to "distill" or "reflect" (Petitioners' Brief p. 38) the labor/antitrust decisions of the Court, but "the Court has not imposed antitrust liability on every 'conspiracy', since such a rule would have subjected multi-employer bargaining units, most-favored-nation clauses, and pattern bargaining to antitrust scrutiny by federal courts."[51] The Court has recently once again carefully

[48]Indeed the ports have put at least one measure of their economic strength in the record (*see* App. p. 50). The scale of their investment is sharply distinguishable from the small independent mine owners threatened in *Pennington*.

[49]A.P. p. 50a.

[50]See the discussion *infra*, Section D demonstrating the Commission's lack of labor experience or expertise.

[51]Note, *The Supreme Court, 1974 Term*, 89 Harv. L. Rev. 241 (1975).

explained that the object of the labor exemption is not to prevent the elimination of wage competition—perhaps the primary purpose of all labor organizations—but to prevent anti-competitive arrangements *unrelated* to wages and working conditions which have a direct effect on prices and on the "business market."[52] *Connell Construction Co. v. Plumbers & Steamfitters Local 3*, 421 U.S. 616 at 622-23 (1975).

Supplemental Memorandum No. 4 is concerned with the terms of access to a *labor* market, not to a business market. Each of its terms is concerned with the conditions of employment; it has nothing to do with the markets of the employers or the prices charged to their customers, except to the extent that an equal improvement in labor standards throughout the industry will make their services generally more expensive. "There is nothing even remotely illegal about such bargaining."[53]

Aiding "non-labor groups to create business monopolies and to control the marketing of goods and services" is not within the labor exemption[54] but there is

[52]See in this regard Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. Chi. L. Rev. 659 (1965). *See also Apex Hosiery Co. v. Leader*, 310 U.S. 469 at 503-4 (1940), the "elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act."

[53]Justice Goldberg concurring and dissenting opinion, in *Jewel Tea*, (381 U.S. at 726). See also *Associated Milk Dealers v. Milk Drivers Local 753*, 422 F.2d 546 (7th Cir. 1970); *Dolly Madison Industries, Inc. and Teamsters Local 592*, 182 N.L.R.B. 1037 (1970).

[54]381 U.S. at 737 (Douglas, J., dissenting).

no such activity in this case. There is no finding of an attempt by the ILWU to help rig the business market to achieve indirectly improved benefits; rather its has been a consistent attempt to raise the laboring standard by an insistence on increased benefits throughout the bargaining unit. Hence, the situation, even as analyzed by the Commission, is similar to that in *Jewel Tea*. The Ports complain only of the union's asking them to provide the same benefits upon the same conditions as those agreed to by the multi-employer bargaining unit if they use the facilities created by the union in that bargaining unit.[55]

In *Jewel Tea* the restriction on marketing hours were found to be a mandatory subject of bargaining,[56] leading the Court to hold that an agreement on such "subjects between the union and the employees in a bargaining unit is not illegal under the Sherman Act, nor was the Union's unilateral demand for the same contract of other employers in the industry" (White, J., 381 U.S. at 691). Thus, since the Commission was wrong in its first conclusion that Supplemental Memorandum No. 4 was a non-mandatory subject of bargaining (*supra*, Sections IV and V), and, given that it made no finding of predatory intent, petitioners' argument that the memorandum was not labor-exempt dissolves.

Yet even if the Memorandum were a non-mandatory item of bargaining there is still not sufficient anti-

[55] *See* 381 U.S. at 688 (White, J. citing the district court opinion).

[56] *See* 381 U.S. at 691 (White, J.).

trust—let alone Shipping Act—concern to overbalance the clear labor policy of eliminating wage competition by means of pattern bargaining. In both *Pennington* and *Allen Bradley Co. v. Electrical Workers Local 3*, 325 U.S. 797 (1945), there were significant elements absent here—predatory intent and direct actual damage done to the marketplace by enforcement of the agreement. This Court has yet to find predatory intent simply based upon agreements between unions and multi-employer bargaining units which have competitive effects on third parties, and there is no other basis for any such finding in this case. Nor is there any intent here to drive anyone out of business or to push small operators "to the wall." The only characterization of the respondents' intent made by the Commission is an intent to push the ports into a multi-employer unit *on the same terms as others.*

The Commission failed to understand that "collective bargaining inevitably involves and requires discussion of the impact of the wage agreement reached with a particular employer or group of employers upon competing employers," and that the effect of its decision "to bar a basic element of collective bargaining from the conference room," will be to substitute unilateral force for rational discussion. *(Jewel Tea,* 381 U.S. at 714, Goldberg, J., concurring).

The policy interests of the ILWU are reflected in Supplemental Memorandum No. 4. That the memorandum also reflects some of PMA's interests is inevitable if good faith bargaining is engaged in. Just such a coincidence of interests was evidenced below.

The union's position in negotiations was that the PMA benefits be made available to *all* employees no matter for whom they worked, whether members of PMA or not. PMA, on the other hand, wanted *no* further participation in its programs by nonmembers who did not assume full responsibility for maintenance of the registered work force.

Given the difficulty of applying the labor exemption to any particular set of facts, it hardly seems likely that the Commission has isolated the essential elements of the case law."[57] The court of appeals was diplomatic when it cautioned the Commission against "parsing the [Supreme] Court decisions in this highly complex area." The court of appeals noted the very real danger that such oversimplification would "create a legal conundrum in which the total labor/antitrust exemption is still greater than the sum of [the Commission's] parts" (A.P. p. 40a.

It is understandable that an agency without labor expertise would misinterpret this Court's shorthand term "labor exemption." As used by the Commission the word "exemption" is a misnomer, for it implies that the antitrust laws apply generally and the labor laws only intersticially when in fact the "exemption" is the line of demarcation between two equally honored national policies. By misusing the term "exemption" the Commission begs the difficult question of

[57]The academic debate in this area has been as extensive as it has been inconclusive. *See* Meltzer, *supra*, 32 U. Chi. L. Rev. 659 (1965); Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252 (1955); St. Antoine, *Connell: Antitrust Laws at the Expense of Labor Law*, 62 U. Va. L. Rev. 603 (1976).

which policy and statute predominates in any given case. Labor interests were never intended to be reached by the antitrust statutes, and when the issue arose the labor movement received the Clayton Act. *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940); *Hunt v. Crumboch*, 325 U.S. 821(1945); *Allen Bradley Co. v. Electrical Workers Local 3*, 325 U.S. 797 (1945).

This Court has made it unmistakably clear that reconciling the conflicting demands of the various statutory schemes is the responsibility of the federal courts,[58] not of any administrative agency; certainly not of the FMC. Its most recent decision in this area reaffirms the unique qualifications of the federal courts in lieu of executive agencies to perform this function *(Connell, supra)*.

D. The FMC Is Not the Proper Forum to Weigh Collective Bargaining Agreements

The line drawn in *Volkswagenwerk* must remain clear and distinct in the face of attempts by the Commission to expand its jurisdiction so as to include some collective bargaining agreements, for the pre-implementation procedures of the Shipping Act cannot be reconciled with the national labor policy of free collective bargaining. The Commission does not appreciate the significance of pre-implementation scrutiny of a collective bargaining agreement. Indeed, petitioners argue here that respondents should be pleased to be immunized against the application of the

[58]*Allen Bradley*, 325 U.S. at 806: "The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile."

antitrust laws as provided for by the Shipping Act for Commission-approved agreements.[59] The promised benefit is illusory as far as unions are concerned.

What would be the final irony, were it not so serious a threat, of this attempt by the Commission to bootstrap its way into labor relations is that, if the FMC is held to have the jurisdiction to exempt collective bargaining agreements from the antitrust laws, it can only inure to the benefit of employers. It will afford no protection to the unions who are not persons subject to the Act and who will remain vulnerable to antitrust attack. No one has ever held that unions are persons subject to the Shipping Act. The Commission has conceded this but believes that it has jurisdiction over "mixed" agreements, i.e., where one of the parties to an agreement is subject to the Act *(see Boston Shipping,* 16 F.M.C. at 10; *New York Shipping,* 16 F.M.C. at 389). Yet that jurisdiction has only been successfully invoked where the agreement was found to run between persons either expressly subject to the Act or closely allied to it, e.g., terminal operators. *New York Shipping Association v. Federal Maritime Commission,* 495 F.2d 1215 (2d Cir. 1974), cert. denied 419 U.S. 964 (*see* A.P. 52a-56a, 73a). This anomalous result of the Commission's extension of de facto jurisdiction must be an intolerable result to organized labor. Nevertheless petitioners suggest that the ILWU should see this one-sided exemption as desirable (Petitioners' Brief p. 29).

[59]Petitioners' Brief, p. 29.

It seems obvious that what the Ports are seeking to protect is some real or imagined competitive advantage in dealing with the ILWU outside of PMA while utilizing PMA's fringe benefit resources. In short, the Ports see in this action potential protection for wage competition in fringe benefits. In this context it is not uninteresting to the ILWU that the Commission claims to see a shipping concern even though they do not include a single shipping element in their "balance" of national policies. It is apparent that the Commission believes that the encouragement of *wage competition* is still the rule of the land and that it supports the Ports' efforts to promote it. We submit that the FMC evaluation,

> to quote Mr. Justice Holmes, "really comes down to a proposition of policy of rather a delicate nature concerning the merit of the particular benefit . . . and suggests a doubt whether judges with different economic sympathies might not decide such a case differently when brought face to face with the issue." [Holmes, *Privilege, Malice and Intent,* 8 Harv. L. Rev. 1, 8 (1898); in Frankfurter and Greene, *The Labor Injunction* (1930) p. 26.]

Petitioners disregard the fact that the entire basis of the labor laws in this country is that the organized power of the corporation must be met with the strength of collective action. The ruling by the Commission, "would make nearly impossible the maintenance or prompt restoration of industrial peace" (A.P. p. 28a).[60]

[60]"A collective bargaining agreement is the product of negotiations. How can negotiators sitting at a table arrive at an

Moreover, the performance of the Commission in the arena of maritime labor relations provides no assurance that it could maintain or promptly restore industrial peace. In its first exercise of jurisdiction in this area, *United Stevedoring Corp. v. Boston Shipping Association,* 15 F.M.C. 33 (1971), on remand from the First Circuit Court of Appeals, 16 F.M.C. 7 (1972), the Commission failed to recognize that a maritime union has a continuing interest in the allocation of work and that contract provisions pertaining thereto do not constitute "the type of agreement requiring Commission approval under section 15."[81] The Court of Appeals for the First Circuit, however, recognized at once that the intrusion into, and possible conflict with, labor activities and the jurisdiction of the NLRB is more than theoretical. The court of appeals saw that the seven-month delay, which was necessary to take the *Boston Shipping* decision to the court of appeals, was already far too lengthy in the labor law context and it insisted that the Commission complete its new report within ninety days. The delay that concerned the court in *Boston Shipping* pales

agreement if they know that a major part of it depends on the approval of the Federal Maritime Commission? How many months—or years—will it take to get approval? What will happen meanwhile? Will not the imposition of that kind of administrative supervision bring an end to, or at least partially paralyze, collective bargaining?" [*Volkswagenwerk v. FMC,* 390 U.S. at 310 (Douglas, J., dissenting.)]

[81]15 F.M.C. 33, 44-45 Compare the conclusion of Hearing Counsel herein that:

> there are so many factors which relate to antitrust and labor laws and policies rather than the Shipping Act that the Commission ought to leave these matters to the courts and the NLRB who are equipped to cope with them. [App. pp. 143-44.]

into insignificance when set against the five-year delay already accumulated in this case.

Petitioners protest the lack of "empirical data" to support what they assert was the court of appeals "exaggerated" analysis of the impact of delay upon collective bargaining,[82] implying that times have changed and that agreements are no longer "worked out in eleventh-hour bargaining sessions, or, as in this case, in hard-fought negotiations following a strike and mediation."[83] If the petitioners need "empirical data" they need only examine the history of labor relations on the West Coast. The reality of collective bargaining, despite petitioners' attempts to explain it away, has not changed in the least. The very agreement over which the Commission has asserted jurisdiction followed a three-month strike which was resolved, ultimately, only by the intervention of a labor mediator (App. pp. 87-89).

The Commission's reconsideration of *Boston Shipping* following remand does not suggest a developing labor expertise. In a remarkably short time the Commission fashioned from the decisions of this Court a four-pronged test by which it would in the future determine whether a labor agreement was within its jurisdiction.[84] Without apparent recognition of the fact that Congress long ago determined that questions

[82]Petitioners' Brief, pp. 28, 29.

[83]Petitioners' Brief, p. 27.

[84]The Commission was given 90 days in which to reconsider. It should be noted that the four-pronged test is *obiter dicta,* since the FMC concluded that it did not have jurisdiction in *Boston Shipping.*

pertaining to good faith bargaining, mandatory subjects of bargaining, and the scope of a bargaining unit require the expertise of the NLRB with only limited review in the courts,[65] the FMC made its jurisdiction dependent on how it answered just these questions. Further, it reached the surprising conclusion that failure to meet any *one* requirement of its four-pronged test of jurisdiction required that it assume jurisdiction, notwithstanding this Court's repeated warnings to the federal courts that the accommodation of equally important federal policies requires sensitive evaluation and weighing of *many* factors.[66]

In this case, the Commission demonstrates its inadequacy as a labor tribunal in two significant ways. First, it attempts to dispose of the question of what may or may not be a mandatory subject of bargaining without any apparent recognition that this is one of the most troublesome areas of labor law for the NLRB which has primary jurisdiction to make such determinations.[67] The Commission does not appreciate that Supplemental Memorandum No. 4 dealt with fringe benefits and access to a work force—well-established subjects of bargaining.

---

[65]*Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

[66]*Supra*, n.32.

[67]*National Labor Relations Board v. Truck Drivers Local 449*, 353 U.S. 87 (1959); *National Labor Relations Board v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958); *Teamsters Local 24 v. Oliver*, 358 U.S. 283 (1959); *Fibreboard Paper Products Corp. v. National Labor Relations Board*, 379 U.S. 203 (1964); *Local 189, Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965); *National Woodwork Manufacturers Association v. National Labor Relations Board*, 386 U.S. 612 (1967); *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

Then the Commission asserts that it is "possible" that the ILWU "may" commit a series of acts, each of which may be an unfair labor practice under the Labor Management Relations Act (A.P. p. 70a). The Commission apparently does not realize that any act by a union to coerce an employer into joining a multi-employer unit is arguably a violation of the express language of section 8(b)(4)(ii)A of the NLRA.[68] Nor does the Commission appreciate that other hypothetical acts by the ILWU would arguably violate at least four other sections of the Act (A.P. pp. 70a-71a), and, if not, would constitute protected activity under section 7 thereof.

First, even if it is true that the union has engaged in or would engage in activities which would force the Ports to join the Pacific Maritime Association, the union would arguably be guilty of a violation of sections 8(b)(4)(ii)A[69] and 8(b)(1)B[70] of the Labor Management Relations Act.

---

[68]*See, e.g., ILWU Locals 8 & 92 and General Ore, Inc.*, 126 N.L.R.B. 172 (1960).

[69]It shall be an unfair labor practice for a labor organization or its agents . . . (ii) to threaten, coerce, or restrain any person . . . where . . . an object thereof is: (A) forcing or requiring any employer or self-employed person to join any . . . employer organization.

[70]It shall be unfair labor practice for a labor organization or its agents to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining.

> "Both the language and the legislative history of § 8(b)(1) B reflect a clearly focused congressional concern with the protection of employers in the selection of representatives to engage in two particular and explicitly stated activities; namely, collective bargaining and the adjustment of grievances. By its terms, the statute proscribes only union restraint or coercion of an employer 'in the selection of his representatives for the purposes of collective bargaining or

Second, if the union denied to nonmember employers personnel from the joint dispatching hall, it would arguably be in violation of Sections 8(b)(4)(i)A,[71] as well as Section 8(b)(1). *ILWU Locals 8 & 92 and General Ore, Inc.*, 126 N.L.R.B. 172 (1960).

Third, if the union refused to work alongside nonunion personnel whom it did not seek to represent, it would arguably be in violation of Section 8(b)(4)(i, ii)D, as well as 8(b)(1)B and 8(b)(4)A.[72]

Fourth, if the union put up, or threatened to put up, picket lines at the entrances to the Ports' terminals and thus stopped the movement of all cargo being delivered to or taken from such terminals by other

---

the adjustment of grievances', and the legislative history makes clear that in enacting the provision Congress was exclusively concerned with union attempts to dictate to employers who would represent them in collective bargaining and grievance adjustment." *Florida P & L v. Elec. Workers Local 641*, 417 U.S. 790 at 803 (1974).

[71]It shall be an unfair labor practice for a labor organization or its agents . . . to engage in, or to induce or encourage any individual employed by any person . . . to engage in a strike or a refusal in the course of his employment to . . . perform any services . . . where . . . an object thereof is: forcing or requiring any employer . . . to join any . . . employer organization . . . .

[72]It shall be an unfair labor practice for any labor organization . . . to engage in, or to induce or encourage any individual employed by any person . . . in a strike or a refusal . . . to perform any services; or to threaten, coerce or restrain any person . . . where in either case an object thereof is . . . forcing or requiring any employer to assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization, or in another trade, craft or class.

See Harnischfeger Corp. v. Sheet Metal Workers Local 94, 436 F.2d 351 (6th Cir. 1970); *NLRB v. Operating Engineers Local 825*, 400 U.S. 297 (1971); *NLRB v. Plasterers Local 79*, 404 U.S. 116 (1971); *NLRB v. Elec. Workers Local 3*, 542 F.2d 860 (2d Cir. 1976); *Glass Workers Local 1892*, 141 N.L.R.B. 106 (1963); *ILWU Local 8 et al. and General Ore, Inc.*, 128 NLRB 351 (1960).

union personnel, it would arguably be in violation of section 8(b)(3).[73]

The ILWU denies that it has been or would be guilty of the illegal acts hypothesized by the Commission. Yet even if these acts occurred, the NLRB, and not the Commission, is the proper agency to determine whether they were illegal and, if so, the appropriate remedy for the protection of injured persons.[74]

In the last analysis the Commission does not appreciate that good faith industry-wide collective bargaining necessarily involves a consideration of the interests of parties outside the immediate bargaining unit. It was not illegal for the ILWU to bargain for industry fringe benefits for dockworkers employed by nonmembers. It was not illegal for PMA to be concerned about the terms on which nonmembers participated in its facilities and programs. Since nonmembers have in the past actually participated in the programs, any change in terms *must be* the result of bargaining. Any unilateral change in the conditions of bargaining, would be a breach of the duty to bargain in good faith.[75] Hence, had PMA remained si-

---

[73]It shall be an unfair labor practice for a labor organization . . . to refuse to bargain collectively with an employer, provided it is the representative of his employees.

See NLRB v. Laborers Local 264, 529 F.2d 778 (8th Cir. 1976); *Painters Dist. Council No. 36, AFL-CIO*, 155 N.L.R.B. 1013 (1965).

[74]*Garner v. Teamsters Local 776*, 346 U.S. 485 (1953); *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

[75]Sections 8(a) and Sections 8(d) of the NLRA; *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964); *NLRB v. Katz*, 369 U.S. 736 (1962); *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *General Electric Co. v. N.L.R.B.*, 412 F.2d 512

lent as to its policy decision to alter the terms upon which nonmembers would be permitted to use the PMA-administered program,[75] while bargaining with the ILWU over the terms of the 1972 Agreement, it would have been guilty of an unfair labor practice." *NLRB v. Katz,* 369 U.S. 736 (1962).

Nor does the Commission appear to appreciate that the Labor Management Relations Act also requires good faith bargaining between ILWU and the Ports. The union arguably could not adamantly insist that nonmembers adopt the PMA agreement without violating Section 8(d) of the National Labor Relations Act. Further, if it bargained to an impasse on what the Ports allege to be a non-mandatory item of bargaining, the union would also arguably be in breach of the duty to bargain in good faith (sections 8(b)(3) and 8(d)).[76] The Ports, should events come to pass as prophesied by the FMC, have an adequate regulatory remedy specifically fashioned by Congress to deal with precisely the situations the Commission

(2d Cir. 1969); an employer's motives will be analyzed in the totality of the circumstances. *See NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir. 1953), *cert. denied*, 346 U.S. 887 (1953), and generally *Universal Camera Corp. v. NLRB, supra.*

[75]PMA had determined well before the 1972 negotiations began to alter the terms upon which nonmember participants would be allowed to use the benefit institutions *(See* App. pp. 104-05).

[76]*See NLRB v. Laborers Local 264,* 529 F.2d 778 (8th Cir. 1976).

[77]*Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964); *NLRB v. Katz,* 369 U.S. 736 (1962); *H.K. Porter Co. v. NLRB,* 397 U.S. 99 (1970). By the same token, had the strike during which bargaining took place in 1972 been found to be an attempt to insist upon a non-mandatory item the union would arguably have been guilty of an unfair labor practice. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342.

describes to be within the intent of the language of section 15.

The Commission has attemped an impossible task. It simply is not reasonable to expect an executive regulatory agency to balance the goals of three separate statutory schemes when it has expertise in only one. Yet such a balancing act is precisely what is required of the FMC if its view of its jurisdiction is endorsed by this Court.

VIII. CONCLUSION

The holding of this Court that section 15 does not reach collective bargaining agreements and the warning of two courts of appeals that the exercise of pre-implemetation scrutiny of collective bargaining agreements by the Federal Maritime Commission would confound the national labor relations policy should go unheeded no longer. Respondents respectfully submit that this Court cannot condone the Commission's assertion of jurisdiction over Supplemental Memorandum No. 4. The court of appeals decision should be affirmed.

Dated, San Francisco, California,
September 20, 1977.

Respectfully submitted,

NORMAN LEONARD,
1182 Market Street,
San Francisco, California 94102.
Attorney for Respondent International Longshoremen's and Warehousemen's Union.

GLADSTEIN, LEONARD, PATSEY & ANDERSEN,
1182 Market Street,
San Francisco, California 94102.
Of Counsel.